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No. 98-1506

In The

Supreme Court of the United States

DONALD D. BARRY, ESQ., et al.,

Petitioners,

vs.

McSHARES, INC., d/b/a RESEARCH PRODUCTS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Did the Supreme Court of Kansas properly reverse the order of the trial court granting judgment for petitioners in a state court civil action for malicious prosecution and abuse of process on the grounds that Federal Rule of Civil Procedure 11 and Federal Antitrust Law do not preempt state malicious prosecution and abuse of process claims arising out of Federal Antitrust actions.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent McShares, Inc., d/b/a Research Products, respectfully suggests that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the Supreme Court of Kansas. That opinion is reported at *McShares v. Barry*, 266 Kan. 479, 970 P.2d 1005, 1015 (Kan. 1998).

STATEMENT OF CASE

I. NATURE OF THE CASE, THE COURSE OF THE PROCEEDINGS AND DISPOSITION OF THE SUPREME COURT OF KANSAS

Respondent McShares, Inc. was a defendant in a federal antitrust class action, based on the alleged violation of the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.*, styled *Albert City Elevator Co. v. Pestcon Sys., Inc., et al.*, Case No. 93-CV-2496, filed by the petitioners and others on December 3, 1993 in the United States District Court for the District of Kansas. The *Albert City* case was later combined by the federal district court with other similar class actions, for pretrial and trial purposes, into Master File No. 93-2452-KHV. McShares, Inc. prevailed at the trial of the federal antitrust class action and judgment was entered in favor of McShares on October 31, 1995 in the separate *Albert City* action, Case No. 93-CV-2496-KHV. Respondent did not file a motion for sanctions against the petitioners and antitrust plaintiffs for bringing a frivolous claim against respondent, pursuant to Federal Rule of Civil Procedure 11, at any time during or at the conclusion of the federal antitrust class action.

On November 27, 1996, within one year of the date when the *Albert City* judgment became final, respondent McShares filed this state common law action for malicious prosecution and abuse of process against the petitioners and other defendants based on their abusive actions in naming and prosecuting respondent McShares for alleged federal antitrust violations. The petitioners removed the case to federal court, but the case was remanded due to the failure of all defendants to timely join in the removal. Some of the defendants moved for judgment on the pleadings, dismissal of the action, and/or alternatively, for summary judgment, on the grounds that respondent's common law actions for abuse of process and malicious prosecution arising out of Sherman Act litigation were totally preempted by Federal Rule of Civil Procedure 11. The District Court of Saline County, Kansas sustained defendants' motions and dismissed respondent's causes of action on the grounds that federal antitrust law and Federal Rule of Civil Procedure 11 preempt any state cause of action for abuse of process or malicious prosecution which arises out of claims which are within a federal court's exclusive jurisdiction. The Supreme Court of Kansas subsequently reversed the trial court and remanded the case to the District Court of Saline County, Kansas for further proceedings, holding that state law claims for malicious prosecution and abuse of process based on an underlying antitrust claim were not preempted by federal antitrust law or Federal Rule of Civil Procedure 11.

REASONS FOR DENYING THE WRIT

I. The Kansas Supreme Court Correctly Held That Federal Rule of Civil Procedure 11 Does Not Preempt or Replace State Law Claims for Malicious Prosecution and Abuse of Process Based Upon Federal Claims Exclusively Within the Jurisdiction of the Federal Court.

The opinion of the Kansas Supreme Court that state law malicious prosecution and abuse of process claims arising out of federal antitrust actions are not preempted by federal antitrust law or Federal Rule of Civil Procedure 11 correctly followed prior relevant decisions of this Court holding that Federal Rule of Civil Procedure 11 does not supplant state law malicious prosecution claims and that federal antitrust law does not preempt state law remedies. *See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 112 L. Ed. 2d 1140, 119 S. Ct. 922 (1991) and *California v. ARC America Corp.*, 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989).

A. The Kansas Supreme Court Correctly Ruled That State Law Claims For Malicious Prosecution and Abuse of Process Are Not Preempted by Federal Antitrust Law.

Federal antitrust statutes do not preempt state law claims for malicious prosecution and abuse of process. This Court has previously determined the relevant considerations in ascertaining when Congress has preempted state regulation or law in a given case. In *California v. ARC America Corp.*, 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989) this Court stated:

> The path to be followed in preemption cases is laid out by our cases. It is accepted that Congress has the authority, in exercising its Article I powers, to preempt state law. In the absence of an express statement by Congress that state law is preempted, there are two other bases for finding preemption. First, when Congress intends that federal law occupy a given field, state law in that field is preempted. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 212-213, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983). Second, even if Congress has not occupied the field, state law is nevertheless preempted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, *Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142-143, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963) when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941). *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984).

490 U.S. at 100-101.

In order to determine whether or not Congress intended to preempt common law claims of malicious prosecution and abuse of process, it is necessary to review the various tests for federal preemption in light of federal antitrust law and state malicious prosecution and abuse of process claims. This analysis must be made in light of the presumption against finding preemption of state law in areas traditionally regulated by the states,

such as antitrust. *See California v. ARC America Corp.*, 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989).

First, petitioners do not argue that Congress made an explicit statement that all state law in the field of antitrust is preempted. No such statement may be found in the federal antitrust laws.

Second, petitioners do not and cannot persuasively argue Congress has thoroughly occupied the legislative field of antitrust law so as to "make reasonable the inference that Congress left no room for the states to supplement it." This contention was rejected by the United States Supreme Court in *California v. ARC American Corporation*, 490 U.S. 93, 101, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989).

Third, there is no actual conflict between state malicious prosecution and abuse of process claims and federal antitrust law. *See Florida Lime Avocado Growers v. Paul*, 373 U.S. 132, 142-143, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963). In this case, there is no conflict between permitting recovery for frivolous and abusive antitrust litigation under state law and permitting recovery for legitimate claims that federal antitrust laws have been violated.

Petitioners argue that Kansas malicious prosecution and abuse of process claims based on an unsuccessful federal antitrust claim are implicitly preempted because the state law claims are "an obstacle to the purposes and objectives of Congress" in enacting the federal antitrust laws. Petitioners fail to satisfactorily explain why the state law claims are an "obstacle to the purposes and objectives of Congress" and a close examination of this contention reveals that it is devoid of merit.

The premise of petitioners' preemption argument is that state malicious prosecution and abuse of process claims will act as a disincentive to persons contemplating pursuing antitrust claims. Petitioners cite no legal or factual basis in support of this assumption. There is certainly no federal policy encouraging unfounded or frivolous antitrust actions or of discouraging persons injured by wrongful litigation from seeking redress. *See Del Rio v. Jetton*, 55 Cal. App. 4th 30, 63 Cal. Rptr. 2d 712 (1997) (tort action for malicious prosecution does not conflict with Section 1988's purpose of encouraging good faith civil rights actions).

Further, assuming that persons with meritorious antitrust claims are not deterred by the prospect of sanctions under Federal Rule of Civil Procedure 11, there is no reason to believe that state remedies will operate as a disincentive. Federal Rule of Civil Procedure 11 currently subjects a lawyer signing a federal court pleading to an objective standard of reasonable inquiry, a standard similar to the probable cause inquiry presently required under Kansas law of malicious prosecution. *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438, 449 (1980); *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 112 L. Ed. 2d 1140, 119 S. Ct. 922 (1991). In this case, it is not necessary to deprive Kansas citizens of their state law remedies for abuse of process and malicious prosecution in order to avoid creating a disincentive for plaintiffs with meritorious antitrust claims.

This Court has clearly rejected federal preemption of state laws in antitrust cases on the basis of speculative antitrust claim "disincentives" which are merely incidental to state law claims. Assuming, arguendo, that there is

any basis for the dubious speculation that plaintiffs with meritorious antitrust claims will, despite the prospect of recovering treble damages and attorneys fees, be deterred by the prospect of state court remedies, it is an insufficient basis upon which to eliminate state tort remedies.

In *California v. ARC American Corporation*, 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989), this Court held that state antitrust statutes permitting recovery by indirect purchasers were not preempted by the federal antitrust law rule barring indirect purchasers from recovering damages for violations of federal antitrust laws. Reversing the Ninth Circuit, this Court held that state laws permitting indirect purchaser recoveries from antitrust defendants did not pose an obstacle to the accomplishment of the purposes and objectives of Congress even though the state laws might have an indirect effect on incentives to bring suit. This Court rejected the reasoning that allowing state indirect purchaser claims could reduce the incentives of direct purchaser to bring antitrust actions by reducing their potential recoveries, that the presence of indirect purchaser claims would reduce settlement offers to direct purchasers, and that if the total liability was to exhaust an antitrust defendant's assets, the direct purchasers would have to share the antitrust defendant's estate in bankruptcy with indirect purchasers. This Court stated, in language that is instructive for the instant case.

> Indeed, taken to its extreme, the Court of Appeals' logic would lead to the preemption of any state law claims against antitrust defendants, even if wholly unrelated, because the presence of other litigation could threaten the

> defendants with bankruptcy and reduce their willingness to settle.

490 U.S. at 104.

This Court rejected the contention that indirect purchasers' claims under state law should be preempted because those claims would operate as a disincentive by reducing the amount that can be paid to direct purchasers. In this case, assuming the prospect of a state malicious prosecution and abuse of process claim operates as a disincentive to meritorious federal antitrust claims, that disincentive is even more *de minimis* and remote than the "disincentive" at issue in the *California v. ARC American Corporation* case, *supra* in light of the existing disincentive under the standards of Federal Rule of Civil Procedure 11.

Finally, petitioners raise the specter of state court "collateral attacks" on federal court decisions. This is also an illusory "risk." Petitioners seem to suggest that if respondent is allowed to seek redress under state law for abuses of a federal antitrust action, there is a risk of inconsistent results or "interference" with federal antitrust law. First of all, by definition, a malicious prosecution claim cannot be brought until the federal court has resolved the antitrust claim in favor of the party asserting the malicious prosecution claim. Therefore, "interference" is an impossibility. Second, any risk of a Kansas court reaching a decision inconsistent with a federal court on an identical issue is illusory in light of Kansas law recognizing collateral estoppel. *Bud Jennings Carpets & Draperies, Inc. v. Greenhouse*, 210 Kan. 92, 499 P.2d 1096, 1100 (1972).

B. Federal Rule of Civil Procedure 11 Does Not Preempt State Law Claims for Abuse of Process and Malicious Prosecution

The Kansas Supreme Court correctly decided that Federal Rule of Civil Procedure 11 does not preempt state common-law actions for malicious prosecution and abuse of process claims that arise out of federal antitrust litigation. The Kansas Supreme Court correctly recognized that Federal Rule of Civil Procedure 11 is a procedural tool, which under the Rules Enabling Act cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. The Kansas Supreme Court also recognized that the Advisory Committee Notes on the 1993 Amendments to Federal Rule of Civil Procedure 11 provide:

> *"Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions.* It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. *See Chambers v. NASCO,* 501 U.S. 32, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991). . . . Finally, it should be noted that *Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process."* (Emphasis added.)

McShares v. Barry, 266 Kan. 479, 970 P.2d 1005, 1015 (Kan. 1998).

Even before the 1993 revisions to Federal Rule of Civil Procedure 11 were enacted by Congress, this Court

made it clear that Federal Rule of Civil Procedure 11 is not intended to preempt independent tort law claims. In *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991), the appellant Business Guides appealed a trial court's order imposing monetary sanctions against it and dismissing its case for Federal Rule of Civil Procedure 11 violations. *Business Guides* argued that imposing sanctions under Federal Rule of Civil Procedure 11 violated the Rules Enabling Act (28 U.S.C.S. § 2072) because it "effectively creates a federal tort of malicious prosecution, thereby encroaching upon various state law causes of action." *Id.* at 551-552. This Court stated, unequivocally, that "*Business Guides'* argument that Federal Rule of Civil Procedure 11 creates a federal common law of malicious prosecution" is "**without merit**." 498 U.S. at 553 (emphasis added).

> The main objective of the Rule is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses. [citation omitted]. . . . Additionally, **we are confident that district courts will resist the temptation to use sanctions as substitutes for tort damages.**

Id. (emphasis added). No language could be clearer. The 1993 revisions to Federal Rule of Civil Procedure 11 and the Advisory Committee Notes explaining those revisions codify the *Business Guides'* holding – Federal Rule of Civil Procedure 11 is not intended to preclude or be a substitute for an independent action for malicious prosecution or abuse of process.

In *Cohen v. Lupo*, 927 F.2d 363 (8th Cir. 1991), a case decided the same year as *Business Guides*, and which is

closely analogous to the instant case, Cohen was sued in an underlying class action for federal securities fraud. After four years of discovery, the securities' claims against Cohen were dismissed on summary judgment. Cohen then moved for Federal Rule of Civil Procedure 11 sanctions and the trial court awarded $100,000.00 in monetary sanctions against the Lupo plaintiffs and their attorneys. Cohen then filed a separate state law action for malicious prosecution to recoup the extensive fees and costs of nearly one million dollars incurred in defending the securities fraud case. *Id.* at 364-365. The malicious prosecution defendants argued that the doctrine of *res judicata*, based on the Federal Rule of Civil Procedure 11 sanctions, precluded Cohen's state action for malicious prosecution. *Id.* at 365. The Court rejected Lupo's arguments holding that "the common law tort of malicious prosecution is a claim in its own right under applicable state law." *Id.* The *Cohen* court opined that Federal Rule of Civil Procedure 11 and the tort of malicious prosecution differ "in their nature, the elements of the claim, and the potential remedies." *Id.* The court instructed:

> [W]hether Lupo & Stemmler acted with malice, or the amount of damages Cohen suffered as a result of Lupo & Stemmler's misconduct [are] irrelevant under Rule 11, but are the sum and substance of the tort of malicious prosecution. The nucleus of operative fact necessary to maintain an action for malicious prosecution includes the conclusion of the underlying action. Whether Cohen would be victorious in the *Bastien* litigation could not have been determined until the conclusion of that case.

Id. at 365.

The Third Circuit has also firmly rejected the argument that a motion under Federal Rule of Civil Procedure 11 preempts a state malicious prosecution action. In *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3rd Cir. 1993), Witco argued that the district court's denial of two Federal Rule of Civil Procedure 11 motions against Witco and Witco's counsel, based on Witco's filing a counterclaim, barred the jury from inferring any malice in determining punitive damages in Lightning Lube's tortious interference claim. *Id.* at 1196. The trial court rejected this argument and the Third Circuit affirmed holding:

> Inasmuch as the denial of a Rule 11 motion does not foreclose the assertion of a subsequent malicious prosecution suit, [citations omitted], neither should it automatically prevent an award of punitive damages predicated on conduct of which the moving party on the Rule 11 motion complained.

Id. at 1196. *Accord, Amwest Mortg. Corp. v. Grady*, 925 F.2d 1162 (9th Cir. 1991) (denial of Federal Rule of Civil Procedure 11 motion will not support federal court's enjoining state malicious prosecution proceeding).

Petitioners argue that Federal Rule of Civil Procedure 11 preempts state law malicious prosecution and abuse of process claims based on underlying causes of action wherein the federal courts have exclusive jurisdiction. Petitioners' argument is as follows: (1) antitrust is an exclusively federal action; (2) the issue of whether the underlying claim was instituted without probable cause is necessarily a question involving federal law decisions and (3) therefore, the probable cause issue must *only* be

decided through Federal Rule of Civil Procedure 11 in federal court.

Petitioners offer no persuasive reason or authority supporting the conclusion that Federal Rule of Civil Procedure 11 is the exclusive remedy for frivolous antitrust federal claims. This Court has consistently held that state courts may decide questions of federal law. State courts are quite capable of reviewing and following federal precedent and do so routinely in nonremovable cases where federal defenses and counterclaims are asserted. *See, Caterpillar, Inc. v. Williams*, 482 U.S. 386, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987) and *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986).

In *Berg v. Leason*, 32 F.3d 422 (9th Cir. 1994) the defendant in a federal securities action was granted summary judgment by the federal court. The defendant then sued the plaintiff for malicious prosecution in state court. The matter was removed to federal court on the grounds that since the malicious prosecution claim was based on an alleged violation of federal law, it presented a federal question thereby conferring jurisdiction on the federal court. Although the district court denied the plaintiff's motion to remand, the Ninth Circuit reversed, holding that no federal question jurisdiction existed for three reasons: (1) the state court need only decide whether the underlying claim was "legally tenable;" (2) the cause of action was created by state law, and (3) state law controls the standard by which the strength of a federal claim in the underlying action is measured. *Berg*, 32 F.3d at 423. In coming to its conclusions, the federal appellate court

considered the following arguments raised by the defendant. First, the defendant argued that the state court would have to analyze federal securities and RICO claims and whether probable cause supported them, which presented pivotal and substantial questions of federal law. *Id.* at 424. Rejecting this first argument, the court stated:

> Berg's burden is not to show that RICO, or the securities law, were or were not violated; that, of course, was favorably determined in the underlying action. Rather, "the probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable." *[citation omitted]*. "Legally tenable" is a low level of generality. . . .

Berg, 32 F.3d at 424-425. More significantly, the court held that "how much merit the underlying action must have is a state-law matter . . . that federal law is not dispositive because the degree of strength required to put the underlying federal claim over the probable cause threshold is determined by state law." *Id.* at 425.

Second, the defendant argued that allowing independent state court actions for abusive federal litigation would inhibit plaintiffs from bringing legitimate actions under federal law. *Id.* at 425. The *Berg* appellate court rejected this second argument. "We do not see how: Two federal courts have already determined that Leason's federal claims lacked merit. The federal interest, which lies in providing a forum for the protection of federally-created rights, has already been served and will not be

disserved by a state court determining whether the federal complaint met the test of being 'legally tenable.' " *Id.* at 425.

Finally, the defendant raised a "preemption-like" argument that since Congress has given the federal court exclusive jurisdiction over the 1934 Federal Securities Act, that federal judges know more about the securities laws than do state judges. Again, the Ninth Circuit rejected the argument, although acknowledging that federal judges may have more expertise in the area of the federal securities law.

> State courts resolve matters of federal law in similar circumstances with no difficulty. . . . In these circumstances state courts directly decide issues of federal law, yet their capacity to do so is inherently a part of the well-pleaded complaint rule. [citation omitted] We therefore see no reason why concern for consistency of federal law – which animates the doctrine of preemption as well as the doctrine of exclusive jurisdiction – should convert a state cause of action with only a tangential federal element into a substantial federal question.

Berg, 32 F.3d at 426.

Berg makes clear that all the Kansas trial court is required to do in respondent's malicious prosecution case is to make a determination as to whether or not the underlying federal complaint filed in the *Albert City* antitrust class action was "legally tenable." This analysis requires the trial court to determine, on the basis of facts known by the defendants, whether their actions in initiating and maintaining the antitrust complaint against

plaintiff was "objectively reasonable" under the standards for probable cause and malice set forth by Kansas law. "The federal element in an action for malicious prosecution is not substantial when the probable cause threshold is crossed by a legally tenable claim." *Berg*, 32 F.3d at 425. Since neither the factual part of the probable cause element, nor the separate question of malice, turns at all on federal law, the Kansas trial court is well-qualified to make the threshold determinations necessary to test the sufficiency of plaintiff's malicious prosecution and abuse of process claims and no special expertise in federal antitrust law is required.

The petitioners primarily cite cases from the bankruptcy arena in support of their argument that Federal Rule of Civil Procedure 11 preempts state law malicious prosecution and abuse of process claims. The Kansas Supreme Court correctly recognized that these cases are distinguishable. With respect to bankruptcy, the Kansas Supreme Court correctly noted that unlike federal jurisdiction of antitrust law, federal bankruptcy law preempts the entire field of bankruptcy.

> Congress was charged with establishing "Uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8. Thus, it enacted the Bankruptcy Act, 11 U.S.C. § 101 *et seq.* (1994) and delegated power to the Supreme Court to prescribe bankruptcy procedural rules, 28 U.S.C. § 2075 (1994), and established the system of bankruptcy courts. Preemption occurs in bankruptcy law because the Constitution grants Congress plenary powers over bankruptcies, and the preemption of the field.

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Unlike bankruptcy preemption, this Court has already decided that federal antitrust laws do not preempt the field. *See California v. ARC America Corp.*, 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989).

Similarly, the argument that Federal Rule of Civil Procedure 11 preempts state malicious prosecution and abuse of process claims based on Labor Management Relations Act cases is also flawed. The case of *Furillo v. Dana Corp. Parish Div.*, 866 F. Supp. 842 (E.D. Pa. 1994) is distinguishable because it involved the construction of a collective bargaining agreement, a task which this Court has previously held must be decided under federal law. In *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571 (1962), this Court explained why the meaning given to terms in collective bargaining agreements must be determined by federal law:

> "[T]he subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' . . . *The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.* Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract.

> Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to it interpretation . . . [and] might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes" (footnote omitted). (emphasis supplied). *Id.* at 103-104.

The existence of the possibility that individual contract terms might have different meanings under state and federal law is not applicable in this case. Here, the trial court will be required to ascertain, *inter alia*, whether or not the federal antitrust claim was instituted without probable cause and with malice. While this determination may require the trial court to determine whether or not defendants possessed sufficient evidence or information to support a federal antitrust claim at the time they instituted their claims, it will not require the trial court to develop federal antitrust laws different than the body of law that has been fashioned by the federal courts.

Petitioners cannot cite to even *one* case holding that independent tort claims for malicious prosecution or abuse of process arising from federal antitrust litigation are preempted by Federal Rule of Civil Procedure 11. The authorities cited by the petitioners for extending Federal Rule of Civil Procedure 11's preemption beyond the bankruptcy area include two 1987 federal civil rights cases and a RICO case. *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning & Zoning Commission*, 674 F. Supp. 1475 (M.D. Ga. 1987), *Great Western Bank v. Southeastern Bank*, 234 Ga. App. 420, 507 S.E.2d 191 (1998) and *Szabo Food Services, Inc. v. Canteen Corp.*, 823 F.2d 1073

(7th Cir. 1987). *East-Bibb, Great Western Bank* and *Szabo Food* are factually and legally distinguishable from this case.

In *East-Bibb,* a federal civil rights suit defendant brought a counterclaim against the plaintiffs for abusive litigation based on Georgia state law. The district court dismissed the counterclaim on the basis that the counterclaim was preempted by the combination of 42 U.S.C. § 1988, the Attorney's Fees Awards Act of 1976 which allows a "prevailing" civil rights litigant to recover for its attorney's fees, and by Federal Rules of Civil Procedure 11. *Id.* at 1476. Without any citation to case authority and noting that the issue was one of first impression for the circuit, the *East-Bibb* court reasoned that by enacting 42 U.S.C. § 1988 and Federal Rule of Civil Procedure 11, Congress simply preempted the entire area of abusive claims based upon federal law. *Id.* at 1476-1477. Unlike the aggrieved defendant in *East-Bibb,* respondent McShares had no similar remedies available to recover its costs, including its reasonable attorneys' fees, in defending the frivolous antitrust litigation brought by the defendants herein. There is no comparable federal statute allowing prevailing federal antitrust defendants to recoup their attorneys' fees, such as the Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988, which is available to civil rights litigants. Although successful federal antitrust plaintiffs can recover their costs, including reasonable attorneys' fees, 15 U.S.C. § 15, there is no similar statutory remedy for prevailing antitrust defendants. Second, *East-Bibb* was analyzed under the 1983 version of Federal Rule of Civil Procedure 11, which made the award of

expenses [including reasonable attorneys' fees] mandatory for Federal Rule of Civil Procedure 11 violations.

> . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiate, **shall** impose upon the person who signed it, . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

East-Bibb Twiggs Neighborhood, 674 F. Supp. at 1476, n.1 (citing entire text of former Federal Rule of Civil Procedure 11, 1987 supplement) (emphasis added); *accord*, *Schrag v. Dinges*, 153 F.R.D. 665, 666 (D. Kan. 1994).

Similarly, the Georgia court in *Great Western Bank v. Southeastern Bank*, 234 Ga. App. 420, 507 S.E.2d 191 (1998) did not take into account the 1993 changes to Federal Rule of Civil Procedure 11. Further, all the cases relied upon by the *Great Western* court were decided prior to the 1993 changes to Federal Rule of Civil Procedure 11. Today, parties such as respondent herein, who are forced to incur hundreds of thousands of dollars to defend against the initiation and prosecution of a frivolous civil antitrust suit, have no guaranteed remedy available under federal law or federal procedure to recover damages, including reasonable attorneys' fees expended in defense of the frivolous suit. Even if the respondent had successfully brought a Federal Rule of Civil Procedure 11 motion against the defendants in the underlying federal antitrust litigation, the federal trial court was required to follow a policy of applying the least severe sanctions

adequate to serve the purpose. *Kiser v. Boeing Co.*, 163 F.R.D. 13 (D. Kan. 1995). Even where the court imposes a monetary sanction, it should ordinarily be paid into the Court as a penalty, not paid to the injured party. *Thomas v. Treasury Management Ass'n*, 158 F.R.D. 364, 370 (D.C. Md. 1994); Federal Rule of Civil Procedure 11, Notes of 1993 Advisory Committee. Thus, federal antitrust litigants, unlike civil rights litigants, have no adequate remedy under federal law or federal procedure; the only adequate remedy for antitrust defendants to recover their damages, including attorney's fees incurred in defending frivolous federal antitrust lawsuits, is through an independent state law action for malicious prosecution and abuse of process.

The petitioners' reliance on *Szabo Foods, supra,* is also misplaced. In *Szabo Foods,* after a federal civil rights plaintiff voluntarily dismissed its claims, the defendant brought a motion under Federal Rule of Civil Procedure 11 for sanctions, including an award of its costs and attorneys' fees. The Seventh Circuit held that despite the plaintiff's voluntary dismissal of its claim, the plaintiff was still liable for the defendant's attorneys' fees as a sanction under Federal Rule of Civil Procedure 11 for bringing a frivolous claim. *Szabo Foods,* 823 F.2d at 1084. *Szabo Foods* is factually distinguishable from the case at hand because it did not involve an independent state law claim for malicious prosecution or abuse of process. The case does not even discuss whether Federal Rule of Civil Procedure 11 motions preempt state law claims for abusive litigation. Instead, the *Szabo Foods* court analyzes the fact that even though the defendant could not bring a claim under the civil rights Attorneys' Fees Awards Act

of 1976, 42 U.S.C. § 1988, since the plaintiff had voluntarily dismissed its suit, Federal Rule of Civil Procedure 11 still provided the defendant with a remedy to recover its attorneys' fees. *Id.* at 1077. Like *East-Bibb*, the *Szabo Foods* court relied on and applied the 1983 version of Federal Rule of Civil Procedure 11 to the defendant's arguments, finding that an award of costs, including attorneys' fees, were mandatory even against prevailing parties if the court finds that the claim was frivolous. Discussing former Federal Rule of Civil Procedure 11's mandatory sanctions, the court stated: "This implies that a court always should be able to award fees, whether the plaintiff wins, loses on the merits, or dismisses his own case." *Szabo*, 923 F.2d at 1077.

CONCLUSION

The Petition for Writ of Certiorari should be denied because the issues raised by petitioners have previously been resolved by this Court. The Kansas Supreme Court correctly followed the precedents of this Court and there is no reason why the Petition merits further review. The Petition presents no important question of federal law nor any conflicts among or between the circuit courts of appeal and state courts of last resort. For the foregoing reasons, respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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